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Attorney for Plaintiff Preston Smith

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**PRESTON SMITH, an
individual,**

Plaintiff,

vs.

**CITY OF BURBANK,
BURBANK POLICE
DEPARTMENT, BURBANK
POLICE DEPARTMENT
OFFICER GUNN; BURBANK
POLICE DEPARTMENT
OFFICER BAUMGARTEN;
BURBANK DEPARTMENT
POLICE OFFICER EDWARDS,
AND DOES 1 TO 100, inclusive**

Defendants.

Case No.: CV 10-8840 VBF (AGRx)

Honorable Valerie Baker Fairbank

**PLAINTIFF'S APPLICATION
FOR AND ORDER DEFERRING
OR CONTINUING DEFENDANTS
MOTION FOR SUMMARY
JUDGMENT AND MOTION FOR
JUDGMENT ON THE
PLEADINGS**

**DECLARATION OF MAX A.
SAULER, ESQ., IN SUPPORT OF
APPLICATION**

**MEMORANDUM OF POINTS
AND AUTHORITIES**

**Proposed ORDER [Filed as a
Separate Document]**

**TO THE ABOVE ENTITLED COURT AND TO ALL INTERESTED
PARTIES AND TO THEIR RESPECTIVE COUNSEL:**

1 **PLEASE TAKE NOTICE** that Plaintiff Preston Smith hereby applies to
2
3 the above entitled court for an order either deferring or continuing the Motion for
4 Summary Judgment of Defendants City of Burbank, Burbank Police Department,
5 Burbank Police Officers Adam Baumgarten and Michael Edwards, and the Motion
6 for Judgment on the Pleadings of Defendant Burbank Police Department Officer
7 Gunn until discovery is complete.
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9

10 Defendants Motion for Summary Judgment and Motion for Judgment on the
11 Pleadings is set for hearing on May 16, 2011.
12

13 This application to defer or continue the Defendants Motion for Summary
14 Judgment and Motion for Judgment on the Pleadings is made pursuant to F.R.C.P.,
15 Rule 56 (d), for good cause shown.
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17 This application is based on the attached Declaration of Max A. Sauler, Esq.,
18 and accompanying Memorandum of Points and Authorities.
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22 DATED: April 22, 2011

LAW OFFICES OF MANUEL H. MILLER

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25 By /s/ Max A. Sauler
26 Max A. Sauler, Esq.
27 Attorneys of Record of Plaintiff
28

DECLARATION OF MAX A. SAULER, ESQ.

I, Max A. Sauler, Esq., declare and state as follows:

1. I am an attorney licensed to practice law before the above entitled court. I know the following facts of my own personal knowledge, except where stated in information and belief. If called upon and sworn as a witness, I could and would competently testify thereto.

2. This action arises out of the alleged actions of Defendant police officers Gunn, Baumgarten and Edwards, in the course of, during and after the arrest of Plaintiff. This case was initially filed in the Los Angeles Superior Court and removed to this court at the request for removal by Defendants.

3. This case was set for trial to commence on November 8, 2011. Following Plaintiff's notice of the depositions of Defendants Gunn, Baumgarten and Edwards by Plaintiff, counsel for Defendants advised counsel for Plaintiff that because of an on-going Internal Affairs Investigation of the Defendant police officers arising out of the events giving rise to this lawsuit, the Defendants would not testify because of the potential for violations of their 5th Amendment rights.

4. Given the inability of Plaintiff to complete his discovery, the parties entered into a Stipulation vacating the trial and vacating all pre-trial dates, which was executed by this court on March 1, 2011.

1 5. As part of the Stipulation (Para. 9 of the Stipulation) the court was
2 advised that, notwithstanding the proposed Stay, the Defendants wished to proceed
3 with the filing and hearing of motions pursuant to F.R.C.P., Rule 12(c) on the issue
4 of whether the instant action is barred by *Heck vs. Humphrey* 512 U.S. 447, 114
5 S.Ct. 2364 (1994).
6

7
8 6. In the same Stipulation (Para. 10) the court was advised the Plaintiff
9 contrary position, that the depositions of the individual Defendant police officers
10 must be completed before Plaintiff can oppose the Defendants *Heck* motions.
11

12 7. A true and correct copy of the Stipulation is attached as Exhibit 1.
13

14 8. The Order vacating the trial provided that Defendants *Heck* motions
15 would be heard on May 16, 2011. A true and correct copy of the court's order is
16 attached hereto as Exhibit 2.
17

18 9. Plaintiff's counsel has been advised that the Internal Affairs
19 investigation arising out of the same set of facts giving rise to this action is still on-
20 going. After receipt of the Defendants Motion for Summary Judgment and Motion
21 for Judgment on the Pleadings the undersigned faxed to Defendants counsel his
22 request that in view of the filing of the *Heck* Motions that Plaintiff be permitted to
23 depose the Defendant police officers. A true and correct copy of my letter of April
24 20, 2011 is attached as Exhibit 3. Counsel for Defendant Gunn responded that he
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1 would not permit his client to be deposed. A true and correct copy of the letter of
2 April 21, 2011 of counsel for Defendant Gunn is attached as Exhibit 4. As of the
3 preparation of this application, the undersigned counsel for Plaintiff has not heard
4 from counsel for the other Defendants in response to my request to depose the
5 Defendant police officers.
6

7
8 10. Plaintiff is unable to completely and substantively respond to both of
9 Defendants *Heck* motions without being able to depose the Defendant police
10 officers. The Defendants *Heck* motions are based on events that transpired in the
11 course of, during and after the arrest of plaintiff. The Ninth Circuit case of *Hooper*
12 *vs. County of San Diego*, 629 F.3d 1127 (9th Cir. 2011) [cited by Defendant Gunn
13 in his Motion for Judgment on the Pleadings] holds that facts surrounding the
14 arrest, and not merely the plea entered by the criminal defendant, may be
15 considered by the court in ruling on a *Heck* motion, depending on the
16 circumstances of the arrest and the alleged excessive force claim. Without the
17 deposition testimony of the Defendant police officers Plaintiff is unable to fully
18 and completely defend the *Heck* motions before this court. Without their
19 deposition testimony, the Plaintiff is unable to inform the court of the facts and
20 circumstances of his arrest and the excessive force committed by the Defendants
21 during his arrest. Without this excessive force information, the court is unable to
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1 make a determination whether “success in [Plaintiff’s] § 1983 claim that excessive
2 force was used during [his] arrest would necessarily imply or demonstrate the
3 invalidity of [his] conviction under § 1248 (a) (1).” Whether the chain of events
4 of his arrest and Plaintiff’s claim of excessive force is, or is not, one continuous
5 transaction, or whether it makes any difference given the holding in *Hooper*,
6 cannot be determined with the depositions of the Defendant police officers.
7

8
9 11. In order to present the court with evidence of the events that
10 transpired during his arrest the depositions of the Defendant police officers are
11 absolutely necessary. Without the testimony that the Defendant police officers will
12 provide, the Plaintiff is unable to present material evidence of what transpired
13 during the course of his arrest and continuance nature of the arrest, and is therefore
14 unable to fully and completely respond to the Defendants *Heck* motions.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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4 **I**

5 **UPON GOOD CAUSE SHOWN THE COURT MAY DEFER OR**

6 **CONTINUE A MOTION FOR SUMMARY JUDGMENT**

7 **AND A MOTION FOR JUDGMENT ON THE PLEADINGS**

8
9 Defendant Gunn filed a F.R.C.P., Rule 12 (c) Motion for Judgment on the
10
11 Pleadings and as part of that Motion asks that the court rely on documents beyond
12 the face of the Complaint. When matters outside the pleadings are presented to the
13 court for consideration on a Motion for Judgment on the Pleadings, the motion is
14 converted into a Rule 56 summary judgment motion. F.R.C.P., Rule 12 (b); *Hal*
15 *Roach Studios, Inc. vs. Richard Feiner & Co.* (9th Cir. 1990) 896 F.2d 1542, 1550.
16
17

18 Both a Rule 56 summary judgment motion and a motion for judgment on the
19 pleadings (that is converted to a Rule 56 summary judgment motion) is subject to
20 being deferred or continued (or denial) to permit the opposing party to obtain
21 necessary discovery.
22
23

24 F.R.C.P. Rule 56 (d) provides:

25 “When facts are unavailable to the nonmovant, if a
26 nonmovant shows by affidavit or declaration that, for
27
28

1 specified reasons, it cannot present facts essential to
2 justify its opposition, the court may:

- 3 (1) defer considering the motion or deny
4 it;
5
6 (2) allow time to obtain affidavits or
7 declarations or to take discovery; or
8
9 (3) issue any other appropriate order.”
10
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12 II

13 **A STATE COURT CONVICTION FOR RESISTING**
14 **ARREST MAY NOT BAR A FOURTH AMENDMENT**
15 **A CLAIM FOR EXCESSIVE FORCE**
16

17
18 The Ninth Circuit case of *Hooper vs. County of San Diego*, 629 F.3d 1127
19 (9th Cir. 2011) held that “a conviction under California Penal Code § 148 (a) (1)
20 does not bar a § 1983 claim for excessive force under *Heck* when the conviction
21 and the § 1983 claim are based on different actions during ‘one continuance
22 transaction.’”
23

24
25 In his application, Plaintiff simply asks for an opportunity to depose the
26 Defendant police officers to be able to present evidence demonstrating that his
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28

1 conviction for resisting arrest does not bar his claim for damages for excessive
2 force by the Defendant police officers pursuant to his Section 1983 claim.
3
4

5 **III**

6 **CONCLUSION**
7

8 For all of the foregoing reasons, this court should grant Plaintiff's
9 application to defer or continue Defendants Motion for Summary Judgment and the
10 Motion for Judgment on the Pleadings.
11
12

13
14 DATED: April 22, 2011

LAW OFFICES OF MANUEL H. MILLER

15
16
17 By /s/ Max A. Sauler
18 Max A. Sauler, Esq.
19 Attorneys of Record of Plaintiff
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PROOF OF SERVICE
UNITED STATES DISTRICT COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

CASE NAME: PRESTON SMITH V. CITY OF BURBANK, ET AL.
CASE NUMBER: CV10-8840-VBF (AGR_x)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 20750 Ventura Blvd, Suite 440, Woodland Hills, CA 91364.

On April 22, 2011, I served the foregoing document described as:
PLAINTIFF'S APPLICATION FOR AND ORDER DEFERRING OR CONTINUING DEFENDANTS MOTION FOR SUMMARY JUDGMENT AND MOTION FOR JUDGMENT ON THE PLEADINGS, DECLARATION OF MAX A. SAULER, ESQ., IN SUPPORT OF APPLICATION, MEMORANDUM OF POINTS AND AUTHORITIES, Proposed ORDER [Filed as a Separate Document], [PROPOSED] ORDER DEFERRING OR CONTINUING DEFENDANTS MOTION FOR SUMMARY JUDGMENT AND MOTION FOR JUDGMENT ON THE PLEADINGS, in this action by placing a true coy thereof in a sealed envelope addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

[X] BY MAIL

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Woodland Hills, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing the affidavit.

[X] FEDERAL

I declare that I am employed in the office of a member of the bar of this Court at whose direction that service was made.

Executed on April 22, 2011, at Woodland Hills, California


Maryam Rance

1 2 3 4 5 6 7	Dennis A. Barlow, City Attorney Juli C. Scott, Chief Assistant City Attorney Carol A. Humiston, Senior Asst. City Attorney Office of the City Attorney 275 E. Olive Avenue P.O. Box 6459 Burbank, CA 91510-6459	Attorneys for Defendants
8 9 10 11 12 13	David D. Lawrence, Esq. Dennis M. Gonzalez, Esq. Nathan A. Oyster, Esq. Lawrence Beach Allen & Choi, PC. 100 W. Broadway, Suite 1200 Glendale, CA 91210-1219 Tel: 818-545-1925 Fax: 818-545-1937	Attorneys for Defendant

Manuel H. Miller, Esq. (SBN 36947)
Max A. Sauler, Esq. (SBN 62634)
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A Professional Corporation
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Telephone: (818) 710-9993
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Email: msauler@miller4law.com

Attorney for Plaintiff Preston Smith

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**PRESTON SMITH, an
individual,**

Plaintiff,

vs.

**CITY OF BURBANK,
BURBANK POLICE
DEPARTMENT, BURBANK
POLICE DEPARTMENT
OFFICER GUNN; BURBANK
POLICE DEPARTMENT
OFFICER BAUMGARTEN;
BURBANK DEPARTMENT
POLICE OFFICER EDWARDS,
AND DOES 1 TO 100, inclusive**

Defendants.

Case No.: CV 10-8840 VBF (AGRx)

Honorable Valerie Baker Fairbank

**[PROPOSED] ORDER
DEFERRING OR CONTINUING
DEFENDANTS MOTION FOR
SUMMARY JUDGMENT AND
MOTION FOR JUDGMENT ON
THE PLEADINGS**

**TO THE ABOVE ENTITLED COURT, AND TO ALL INTERESTED
PARTIES AND TO THEIR RESPECTIVE COUNSEL:**

After considering the Application of Plaintiff Preston Smith for an order
deferring or continuing the Motion for Summary Judgment of Defendants City of

1 Burbank, Burbank Police Department, Burbank Police Officers Adam Baumgarten
2 and Michael Edwards, and the Motion for Judgment on the Pleadings of Defendant
3 Burbank Police Department Officer Gunn until discovery is complete, and all
4 opposing papers, if any, of the Defendants, and
5

6 **GOOD CAUSE APPEARING THEREFORE,**
7

8 **IT IS HEREBY ORDERED THAT:**
9

10 1. The Motion for Summary Judgment, set to be heard on May 16, 2011, of
11 Defendants City of Burbank, Burbank Police Department, Burbank Police Officers
12 Adam Baumgarten and Michael Edwards is deferred [continued] until the Internal
13 Affairs investigation is complete and the Plaintiff has had an opportunity to depose
14 the Defendant police officers and file and serve his opposition.
15

16 2. The Motion for Judgment on the Pleadings, set to be heard on May 16, 2011, of
17 Defendant Burbank Police Department Officer Gunn is deferred [continued] until
18 the Internal Affairs investigation is complete and the Plaintiff has had an
19 opportunity to depose the Defendant police officers and file and serve his
20 opposition.
21
22
23

24
25 Dated: _____
26

27 Hon. Valerie Baker Fairbank
28 United States District Judge

PROOF OF SERVICE
UNITED STATES DISTRICT COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

CASE NAME: PRESTON SMITH V. CITY OF BURBANK, ET AL.
CASE NUMBER: CV10-8840-VBF (AGR~~x~~)

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I declare that I am employed in the office of a member of the bar of this Court at whose direction that service was made.

Executed on April 22, 2011, at Woodland Hills, California


Maryam Rance

1 2 3 4 5 6 7	Dennis A. Barlow, City Attorney Juli C. Scott, Chief Assistant City Attorney Carol A. Humiston, Senior Asst. City Attorney Office of the City Attorney 275 E. Olive Avenue P.O. Box 6459 Burbank, CA 91510-6459	Attorneys for Defendants
8 9 10 11 12 13	David D. Lawrence, Esq. Dennis M. Gonzalez, Esq. Nathan A. Oyster, Esq. Lawrence Beach Allen & Choi, PC. 100 W. Broadway, Suite 1200 Glendale, CA 91210-1219 Tel: 818-545-1925 Fax: 818-545-1937	Attorneys for Defendant